United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7450

ORIGINAL

To be argued by
ROBERT W. FARRELL

In The

United States Court of Appeals

For The Second Circuit

DAILY MIRROR, INC.,

Plaintiff-Appellant,

vs.

NEW YORK NEWS, INC., HARRY (HENRY) GARFINKLE, UNION NEWS CO., INC., AMERICAN NEWS CO., INC., and ANCORP, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLANT

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DAILY MIRROR, INC.

PRELIMINARY STATEMENT

This appeal is from the decision and order of Hon. Marvin E. Frankel, District Judge, Southern District of New York, dated July 3, 1975; which denied plaintiff's motion, pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure, to vacate his order of June 9, 1975, and from the judgment entered by the clerk thereon, dated June 11, 1975, granting by surprise, and to all five defendants, summary judgment

in dismissal of plaintiff's complaint. The decision was granted on defendant News, Inc., motion, for summary judgment; which, itself, was merely offered, by way of a substitute-device suggestion of said defendant's counsel, in place of a Pre-Trial Memorandum, then being scheduled; and which motion was then joined by the four co-defendants, and grew into the District Judge's grant of summary judgment, by surprise declaration on Judge's own motion, of plaintiff's "default", in the presence of two undecided plaintiff's applications, one for his disqualification. The basic 12-page decision, in granting summary judgment on "default", included an incidental disposition, therein, denying his disqualification.

STATEMENT OF THE ISSUES

1. Summary judgment, in any event, may not be granted upon an attorney's argumentative or evaluative affidavit under the Federal Rules of Civil Procedure 56 (e), or worse, upon an attorney's bare letter of request for such relief.

2. Summary judgment to a defendant for dismissal of a Complaint, standing otherwise unchallenged, may not be granted, except upon either

affirmative, exonerative documentary proofs in support of affirmative defenses pleaded, or plaintiff's admissions on file in the action, establishing absence of any triable issue of facts in accordance with Federal Rules of Civil Procedure, 8 (c), 12 (c), 56 (e).

3. A party's default, for failure to submit answering papers, later due, on motion for summary judgment, may not be taken by the District Judge, while the District Judge has already, before him, application, of the same party, for his judicial disqualification, made in acknowledged good faith, and under the authority of the two priority statutes, governing the subject of disqualification, (Section 144 and 455 USC Title 28); and that such taken default, on Judge's own motion, can only come as surprise, within meaning of Rules 60 (b) and 55 (c) Federal Rules of Civil Procedure, to be vacated for such additional reason.

4. Summary judgment, in reverse favor of plaintiff, lies, on this submitted record, where defendants have opened the door, but have failed to

substantially dispute, or deny, the sufficient direct evidence, furnished by plaintiff's affidavits of merits,-subject, only, to hearing reserved for assessment of damages, under Federal Rules of Civil Procedure, 56 (e) and 12 (c).

STATEMENT OF THE CASE

1. Introductory Statement

(a) This action was abruptly ended, on the District Judge's own motion, declaring plaintiff's default, for a lack of prosecution, and by grant of summary judgment "with prejudice" (JA-84) for the five defendants, on a unilateral presentation of one defendant, News Inc., and virtually solely so, and only upon its attorney's agrumentative affidavit on June 9, 1975,--and all done surprisingly, while there were pending, undecided, before the Judge, (a) plaintiff's application dated and filed May 29, 1975 enjoying statute priority, for his disqualification, and though found by the Judge to have been made in good faith by plaintiff and its counsel. (JA--90) (b) an undecided but authorized plaintiff's motion for essential discovery, submitted to the Court duly

on May 27, 1975. (JA27-8)and also, an adjourned date, pending of May 30, 1975, for plaintiff's submission of its answering papers, upon said motion for summary judgment.

(b) This cause of action, as alleged, in all its gravamen, sounding, in conspiracy in restraint of trade, was really born on October 15, 1963, when this defendant News Inc., with vested interest, laid the basis for its later aggressive drive, to eliminate this plaintiff as its competitor, as alleged, by its then entering upon a secret written Contract of Acquisition with the "Hearst" Organisation; (JA-227-8-9) providing for payment of a huge amount of cash, of many millions of dollars, in still undisclosed sums, for the suppression and elimination thereby of its then sole competitor newspaper, the New York Mirror, with which it shared the New York market. That Contract contained a lengthy clause, entitled "Covenant Not To Compete", to be binding for a ten year period. (JA 151-2-3) To this day, defendant News has declined to comply with The District Court's order, to submit the original there-

of, for plaintiff's and Court's Inspection. (JA 151)

But the victim public was let in,--for a rise in the purchase price per copy of the Daily News, after so gaining the tabloid morning reader market as its exclusive domain, with this extinguishment of the "Mirror", this plaintiff's predecessor publication.

2. The Complaint and the Answers

The Complaint, in its various causes, alleges conspiracy, in restraint of trade, to destroy and eliminate a competitor, plaintiff's Mirror, from the same market areas in which the Daily News published (New York City and environs, up-state New York, New Jersey and cities throughout the United States). It alleges violations of the Sherman Anti-trust Act, Clayton Act, New York State Donnelly Anti-trust Act, and the common law against such combinations, claiming authorized, treble damages in total sum of Ninety Million Dollars. It alleges specific predatory acts, in series, (JA-3-4) in fulfillment of the defendants' plan of strangulation of plaintiff's publication and business, the defendants being in dominant control of the interdependent, and more or less

integrated wholesale and retail distribution and circulation and sale of newspapers, magazines, periodicals and paper-backs, in the interstate market.(JA-3)

The Complaint alleges that this conspiracy actively got under way in 1970-1, operating openly and tacitly, barring the public's right to free access to news dissemination and opinion, as represented by plaintiff's Mirror.

The defendant News answered by general denial; and the other 4 defendants, including their chief operating factotum, Henry Garfinkle, by general denial, and an affirmative defense,-claiming that the plaintiff brought this action to coerce the defendant Union News Inc. to purchase plaintiff's Mirror at an excessive price per copy, in unfair discrimination. (JA-5)

3. The History of the Action

Plaintiff filed its action in the United States District Court, Southern District of New York, in March 1971. Defendants answered, as aforesaid.

At no time did any defendant move for

dismissal of the Complaint on any jurisdictional ground, or for legal insufficiency.

Defendant News Inc. did, in August 1973, move for dismissal for lack of prosecution, concerned only with plaintiff's omission as to interrogatories. That motion was denied by District Judge Carter,-with leave to renew, never invoked, (D-13, 26); since then, there has been an intensive and continuous prosecution by plaintiff of the action, in necessary preparation for trial, down to the very moment, at which the District Judge, Marvin E. Frankel, declared plaintiff in "default" for want of prosecution. No defendant was claiming any lack of prosecution, default, or any undue delay of the action by plaintiff at this, or any time. At that moment, plaintiff was waiting upon the District Judge to file decision on two pending priority applications:

(a) a motion for further discovery before trial, (authorised, by the District Judge, to be made by plaintiff, by his memoranda of May 1, 1975, made returnable for May 27, 1975 and on that day submitted by all parties);

(b) an application by affidavit of plaintiff, dated May 29, 1975 certified as to its good faith by its attorney of record, pursuant to Sections 144 and 455 of Title 28 USC (Judiciary Law), for the disqualification of the District Judge, and which affidavit and application, the District Judge found to have been made in good faith, (JA-90-89), filed <u>one day</u> before plaintiff was due to file his answering papers on defendants' application for summary judgment.

The gist of plaintiff's action, and of its allegations of wrongdoing, is secret arrangements by these defendants; and therefore, full discovery-before-trial proceeding were essential to preparation for trial; while inversely, defendents offered resistance to such discovery, and thus to delay their own day of reckoning, by every means; and accordingly they never complained of delay by plaintiff. That is the history (See letter of April 26, 1975, Plaintiff's attorney, Farrell to Judge Frankel in historic recapitulation). (SJA-33-54), (JA-107)

In fact, at the very moment, when the District Judge was "defaulting" the plaintiff, the defendant News was inviting plaintiff, and requesting it to furnish further supporting proof, if any, in opposition to its own motion for summary judgment, 5/5/75 deemed not yet submitted; (D-41, JA142) and did so again in an affidavit on file, dated June 6, 1975, JA143 furnished to the Judge. (JA-102, 142)
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In the interim, since the filing of the action, in 1971, Court administration, on its own motion, had necessarily contributed to the action's delay, by some four reassignments of the case from one District Judge to another (From Pierce J., to Carter J., to Owen J., to Carter, J., to Frankel, J.) There was a consequent interim need to re-establish, and recover, a continuity and consistency of earlier judicial dispositions. (SJA-4, 33)
JA-24-5, JA-2, 2-1

However, solely on defendants' joint account, almost one interim year was lost, in their contesting needlessly, plaintiff's right to proceed with prosecution of its action. The defendants first claimed that it was subject to the stay of the

bankruptcy proceeding, pending in same district, a "Chapter XI Arrangement, of defendant debtor Ancorp Inc.," only to ultimately consent, without objection, to the lifting of said bankruptcy stay, (See Carter J. decision) (JA-25) after plaintiff's thus necessitated motion in the bankruptcy Court. (SJA-33)

With the accession of Judge Frankel, p.2 in March, 1975, plaintiff renewed old undisposed-of motions, and resumed discovery and EBT proceedings. The District Judge, feeling justified by the "3-year-old case" Rule of his Court, developed a firmness against delays; but misdirected his irascibility, (JA-111) (JA88) toward plaintiff, for allegedly overlong letters to the Judge and "delays". (JA-57, SJA33 SA 66) In both respects, it was defendants, (and their delays and letters) who had been the guilty parties. (ditto SJA34) And we (JA-123) accordingly justly so protested to the Judge. (ditto) (SJA-43)

A rare turn of events then proved crucial. While the District Judge, in a pre-trial conference in March, 1975, was duly suggesting a Trial Memorandum from the parties, to focus the

issues for the trial, adversary counsel, Mr. Geraghty, (JA-112) for defendant News Inc., however, made a peculiar counter-suggestion for such focus; he proposed his own motion for summary judgment, for a defendant, whose sole answer to the complaint is negative, a general denial, having assumed no burden, by its pleading, of affirmative proof by way of defense, as provided for by Federal Rules of Civil Procedure, 8 (c) and 12 (b). He would move for dismissal of a complaint, which would have to be based upon exonerative documents, or solemn admissions made by the plaintiff against interest, on file, in the action, as those Rules provide.

In fact, the District Judge forewarned, when accepting that counter-suggestion, that such a motion, in an anti-trust conspiracy case, was a rarity, and that he would not grant it, in all probability. (JA-87) The Judge proceeded to schedule dates for service of such motion papers; and for answering papers by plaintiff, (JA-88-89), (which ultimately was set for May 30, 1975). SJA-32

Once again, it was the defendant News Inc., who had then asked for delay. (SJA28, 31, 2)

In the meantime, the defendant News Inc. was deliberately failing to comply with a prior, "fundamental" discovery order of Judge Frankel, for production of that long-withheld, secret document (SJA 33,p.3),-the obvious key, both for plaintiff and the Court, to give decisive meaning to the plaintiff's allegations and proofs of illicit combination, between these five defendants, to wit, that Contract of Acquisition of the old "Mirror", of October 15, 1963.(JA-27)

The defendant News persisted in non-compliance, while pressing for summary judgment, (JA-34), operating contrary, thus, to its own agreement with the Judge and the Judge's call, for focussing of issues. But the Judge restrained himself. (JA-87)(SJA-37)

However, the growing anger of the District Judge was being reserved instead for plaintiff and its counsel; who were endeavoring to demonstrate that the missing information required corresponding additional discovery from the mouths of the signatories, to that collusive Contract, whose names were being kept suppressed, by expungement. (JA-229)

That proof would, in turn, reveal the curren attitude of defendant News, under plaintiff's allegations, stemming from the basic Contract, and would be most pertinent to the Trial Judge's management of the thus focussed issues.

In the unbearable accrual of events at the District Judge's hands, plaintiff felt compelled to file affidavit in recusance, under Sections 144 and 455 of Title 28, United States Code (Judiciary Law). (JA-70) (The latter section had been, most significantly, recently amended by Congress (December 5, 1974). The District Judge, instead of searching his own conscience, under 455, and instead of halting the adjudicative process, as required by the 144 statute, respectively, proceeded, on the one hand ex-parte to invite plaintiff's adversaries, to (SJA 86) assist in that judicial crisis; and who contributed, each, their counsel's affidavit in purported assistance to the District Judge. (JA-95,JA97)
78, 75

Actually, the Judge later rejected and repudiated that help from defendant "News" and its counsel. On the other hand, the "News" undercut the District Judge's action in defaulting plaintiff.

We promptly rejected and returned copies, thereof, served upon us without prior notice of the Judge's request for assistance. (SJA-~~47,48~~ 81-87-83)

The Judge proceeded, on the other hand to adjudicate, and as to the merits of the motion for summary judgment (JA-93) in three respects:-

(a) He found in favor of the defendants, on the merits, "with prejudice"; (JA-94)

(b) He found the plaintiff guilty of lack of prosecution in its failure to file answering affidavits;

(c) He declared the plaintiff in default on said motion for summary judgment, for standing on its affidavit of recusance, until the District Judge's decision thereon, before submitting further on the merits.
At that moment, prosecution, far from lagging, was intense, until that recusance application of May 29, 1975.

None of the defendants had claimed any lack of prosecution, nor had asked that the plaintiff be declared in default; and on the contrary, at the very moment, defendant "News" counsel was asking the Court, in two separate affidavits, to await further presentation of evidence from plaintiff (JA 102,142 143) and stating that he would not oppose plaintiff's application for more time. (D-41,JA142)(JA-143)

Defendant News' however, had gone further in precluding any such decision on the merits against the plaintiff, by offering in support, a thick annexed volume of exhibits, under separate cover; which, if read, clearly exposed to the Court the defendants' joint, long history of predatory activities. (JA 139 to 225) Judge Frankel, besides, found plaintiff and its counsel worthy of belief "in good faith" in recusing the Judge, (JA-90), contradicting the "News" counsel who swore that plaintiff, finding itself unable to answer this peculiar motion for summary judgment, resorted to "any means" to avoid answering. (JA-100-1)

While only one defendant New York News Inc., actually moved, however abortively, for summary judgment, the other four defendants presented virtually nothing, except their own attorney's "me-too" joinder in support of "News", using bare affidavits, or even only, a later discovered letter to the Judge, sent ex-parte, dated June 2, 1975 (from Roy Cohn Esq.) (JA-59,63, 65) for the co-defendants, Ancorp, American News, Union News; who submit-

(JA-39)

(81 SJA)

ted their papers June 10, 1975, and only after the District Judge's decision, June 9, 1975; and again, on plaintiff's motion to vacate, only after the decision of the D. J., dated July 3, 1975, on July 10, 1975. (JA-2-43)

These papers were mere arguments and some personal abuse, and were by the attorneys only (JA-39,59,63), all in drastic violation of Federal Rules of Civil Procedure 56 (e), and completely oblivious to the District Judge's original demand for focussed issues for trial.

(The submission of Roy Cohn, for three of the defendants, was not filed until one day after the decision, granting summary judgment, to wit, on June 10, 1975, containing a pre-dated affidavit, dated and allegedly sworn to on May 14, 1975). There was the prior letter addressed to the Judge by Roy Cohn Esq. dated June 2, 1975, which brought, upon its discovery on June 19, 1975 for its tolerated ex-parte call on the Judge, a same-day telegram from plaintiff's counsel, expressing his "shock" at such tolerated, unrebuked procedure (JA-63,64).

Plaintiff moved promptly to vacate the default judgment upon a full affidavit of merits, (JA 103) and a renewed affidavit of recusance, based upon newly developed events, updated on such account, including the trial judge's recent cast of doubts upon the veracity of plaintiff's counsel, as to the very existence of the original filed recusation. (JA-70, 116)

That motion was dated June 17, 1975, made returnable on July 3, 1975. In the interim, Judge Frankel, on June 23, 1975 made his decision on the renewed application for his recusance; this time the Judge filed his decision in advance of the decision on the plaintiff's main motion to vacate. (JA-226)

Defendant "News" counsel thereupon inquired of the meaning thereof by letter, to which the District Judge responded most interestingly. (JA-241)

Defendants, except as aforesaid, served the slimmest responses to our motion to vacate, avoiding altogether plaintiff's detailed, evidentiary, sworn accounts of events from 1963 to date, covering all phases of the proceedings themselves, as well as

of the conspiracy and predatory relations of the parties. Instead they resorted to abuse of plaintiff and its counsel, as their answer to the merits.

Plaintiff's lengthy affidavits, fully supporting the allegations of its Complaint, by direct competent evidence, now stand virtually uncontradicted, in accounting for the final demise, by strangulation, of plaintiff's Mirror.

(We therefore, as provided by the cited Federal Rules of Civil Procedure, have asked for reverse summary judgment below, in plaintiff's favor instead. (Federal Rules 12 and 56))

Nor did the defendants produce a single defense document in self-exoneration, e.g., release, discharge, res adjudicata, or admissions by plaintiff on file in the action, or any other defense matter, in response to plaintiff's affidavits.

However, the District Judge, short-shrift, on the very day of Motion's return, July 3, 1975, filed his bare-denial memorandum. (JA-244)

4. THE PLAINTIFF"S EVIDENCE

On October 15, 1963, the defendant News, Inc., publisher of the Daily News, a morning and Sunday daily, a pictorial tabloid in format, with the nation's largest daily newspaper circulation, entered into a secret Contract of Acquisition, with the Hearst organisation, aimed at the suppression and elimination of its then sole competitor, the N. Y. Mirror, having daily circulation of 900,000. Both, with the same format, were based in the City of New York, with nation-wide sales. (JA-148)

Undisclosed millions of dollars were paid by defendant News, getting the good will, name, et al., (JA-151) and the absolute right, by specific "COVENANT NOT TO COMPETE" (JA-152,212 JA-217) to keep the Mirror off the market for a ten-year period (JA-217).

All demand, below for production and inspection of the said Contract, was refused by defendant, and by its attorneys of record; who also

were the actual co-authors of that Contract. However, when examined, they were most evasive and vague on the subject. (JA 427etseq JA443 et seq Even after the defendant News Inc. was ordered to produce that Contract by Judge Frankel in 1975, on eve of scheduled trial, (SJA66) its production was withheld; and when, finally only reproduced, and in part only, for delivery, it was a paper, with the price of acquisition deleted, and the signatories names' representing the defendant News-Hearst organisations expunged. (JA221, 214) Counsels explanation only heightened the relevant, importance, of the Contract and its deletions.

(Plaintiff duly rejected that partial paper, returning it as a non-compliance with the Judge's order. (SJA68) (Demand on the Court met with no response. He granted summary judgment instead) To this day, plaintiff has not yet been shown the original, as required.) (SJA 47, 8)

The "Covenant Not To Compete" so entitled, is a long clause. (JA 217 Par 8)

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Defendant News, by same attorneys, on learning that plaintiff's chief operating officer, was planning to establish a Mirror newspaper, to fill the public void, promptly served a Registered Letter in bar, with legal threats for invasion of rights, dated August 31, 1965. (D41,a,b therein presented.

At that time, plaintiff who had duly incorporated, registered and trademarked its "Mirror" (JA-179,180) instituted a probe of the sales market, initially spending some $25,000 in the probe process, to break the Daily News' monopoly in the New York morning tabloid field. Advertising was to be no immediate problem to the success of plaintiff, automatically expected to follow with growth of circulation. (JA-147)

That probe led to the establishment of the plaintiff's low-cost, but most efficient, plant for newspaper production, (JA-147-8) of a most efficient small staff of editorial and reportorial personnel, United Press International wire service, feature writers, photographing facilities, and columnists, drawing upon those formerly associated with the old Mirror, who were without conflicting

ties; in sum, an organisation, offering ready competition, free of all those hazards of labor-union problems, usually besetting the publishers; and the plant, was all set to issue up to a million copies daily, as needed in growth, (JA-148) of an admittedly a well-produced newspaper. (JA-284 JA-285)

Expert opinion, retained to professionally guage the project, the plant, the staff, and the market for its chances of success, rated it excellent. (JA-148-9)

Plaintiff went public, after due and orderly submission to the U. S. Securities and Exchange Commission, and ultimately it represented a financial total public outlay of some $500,000.00. (JA-147)

The defendant News' attorneys warned plaintiff, by a second threatening legal letter, Registered Mail RRR, dated March 16, 1971. (DA41,a,b)

But the attorneys for the News had second thoughts; they never followed through with any lawsuit; and never asserted any counterclaim in this or any other suit, in any court, in protection,

or support, of their asserted rights against this plaintiff or of their acquired monopoly status in New York City.

Instead, defendant News, Inc., (JA-153,4) sought to privately "enjoin" the plaintiff, nonetheless; going in for direct action, taking the law confidently into its own hands, (it enlisted clandestine allies in the industry, holding key positions, whose normal cooperation with the plaintiff, in the due and orderly course of the newspaper circulation business, was essential to the plaintiff's survival and success.) When the attorneys for the News inquired of its top executives about a legal follow-up, its top executive Lynch advised that the attorneys could "forget legal action, the Mirror will die and fold up by itself". (JA437 Maher) (437)

These selected allies of the industry were already at hand, and a functional part of the defendant News Inc.'s distributing, and delivery, and sales organisation, wholesale and retail. (JA-153) They, the team of the News Inc., American News Inc., and Union News Inc., were already notorious collaborating

in the well-known "dirty tricks of the trade". They were headed up by the defendant, Henry Garfinkle, their chief, who had become a multi-millionaire with his own prior established, and adjudicated, predatory and extortion record, a past master at the game.

(JA 153-169)
JA 42-7, JA 48-56

Operating in the New York, New England and upstate areas, they had control of the entire field of wholesale and retail distribution, not only of the daily newspapers, but also the inter-dependent and closely related periodicals, magazines and paper-backs; and then also of the defendants' retail outlets, and of some 10,000 to 13,000 individual newsstands in New York City alone, in addition to the strategically located Union News stands interstate and intrastate (some 650 nation-wide), at railroad and air terminals and city sub-way stations.

This interdependence was a matter of life-and-death, to the Mirror, dictating conformity to the wishes of the ubiquitous Garfinkle. These characters were and are a shoddy lot. Each of them

stands so depicted. (JA153-169etc).

These foregoing facts stand constructively admitted, or conceded without dispute, by the five defendants, who jointly submitted them and those proofs to the Court below.

Plaintiff's Mirror became a real threat to the defendant News. (JA 148-9) At the end of 14 months, the plaintiff, after already showing possibility of an interim weekly profit from circulation, (JA-157) with advertising sources of income necessarily secondary, and to follow, was forced to close down. (JA-157) Plaintiff's Mirror was being barred, and kept from sales display, on the local newsstand, not only of the independent little retailer, but also on those of the Union News, pointing the way. (JA-160-177)

The Mirror's delivery process was tampered with disastrously. (JA-155-6) The defendant News utilized the 'Trojan horse' tactic. (JA-155,7) When the Mirror recovered, its sales went well again. (JA-157) The 'Trojan horse' operator, an employee of defendant News, one Gordon,

disclaimed knowing any executives of defendant News, (JA-156) Inc. but, a top executive, its Director of Circulation, Jack Underwood, contradicted him, admitting he knew Gordon, recognizing his name at once. (JA-156) (JA300) The defendant News bought out plaintiff's delivery agency, Gaynor News, and Underwood became its President. (JA-157)

The intertwined principal actors for the defendant "News", show a profound rapacity, a lustreless veracity, a related underworld Mafia capacity, (JA 42,3,4.5,6,7) and a convenient servility in the master's cause, (Manhattan News, Gaynor News, Archie Gordon, amongst others). The two Garfinkle "executives" at $55,000 per year and $35,000 per year, (McCulloughan-Levine) when examined, answered by repeating each query so often (JA-393-426 JA-375-391) but they could not name or explain the office or the duties of the latter, Willie Levine; so as to leave no one in doubt that they were concealing. (JA-158)

This defendant Garfinkle professed unawareness of any profits being made by his vast empire, but he was ready to clearly state that the Mirror of plaintiff was a "loss". (JA-349,351)

In addition to Union News - operated stands' rejections (650 key locations) of our Mirror, its sale was barred and choked off, by a wide-spread sabotage ; a special burial technique on the independent newstands, throughout the city was used, to keep it off display, earlier employed by Garfinkle, (part of the wide-spread system of "dirty tricks"). (JA-52)

The consistent policy, as if by prearrangement with the witnesses, of all of the deposition testimony of the defendant-witnesses, from the Chairman of the Board of the News, down, when testifying, was to belittle the Mirror or deny it as a competitor of the News and to deny any company anxiety for the plaintiff's Mirror as a competitor, or as a significant threat to the Daily News. The witnesses went to ludicrous lengths in these respects. (D35-JA303-4) The defendant News' field reports, JA-345 made on the Mirror market and sales, had disappeared from the defendants News files; only one tiny report was on hand and the contents of oral reports could not be recalled or located. (JA 265)

In a mysteriously brief telephone conversation, between Garfinkle and Underwood, the latter, obviously in code, on a mere inquiry, "How is business? How is the Mirror doing?" was told, "We have no room for the Mirror, "at a time when the newstands of New York City had been left naked from some earlier 7-10 papers on piled display, with virtually only the New York Times and the Daily News left as the morning papers on daily display; and when, admittedly, competition was a most healthy requirement of the newspaper sales business. (JA-279,JA267)

On the other hand Garfinkle denied ever talking to Underwood at all for the past three years. (JA-334)

The defendant Garfinkle was found by the plaintiff to be the massive personal source of all the destructive activities being directed at the Mirror's existence.

So, plaintiff's chief, Farrell, sought out this Garfinkle, to soften his opposition, through mutual friends of influence. That effort continued from February 1971 to November 1971. (JA-158)

That elaborate effort by plaintiff is set forth in affidavit of Philip Budin, original financier of plaintiff Mirror, Inc. (JA 160) (JA 175) The conversations, and efforts, centered about Garfinkle and his interference with the sales and circulation of the Mirror, and as a central cause of its difficulties, particularly also the removal of the Mirror from his Union News Stands, and the scaring off of others who could assist plaintiff. (JA-166) Garfinkle confessed he and his stands "had no room for the Mirror." (JA-278)

The defendant Garfinkle's pleaded answer on file (JA 5) defends against the Mirror's complaint herein on one ground (JA 5); his extended examination before trial never refers to that defense. His friends, and his associates, holding official position, (JA-162) explained his hostility to plaintiff entirely differently. (JA-175)

Plaintiff's Farrell met with President McCullough of Garfinkle's Companies; (JA 159), he received from, and gave to Farrell an explanation, of price charged by plaintiff, entirely at odds with

Garfinkle's pleaded affirmative defense on the same subject. (JA-5)

Not one of the intermediaries reported to plaintiff that the cause of Garfinkle's hostility to the Mirror was for economic reasons; but rather, friends were warned to "stay out of the matter, its bigger than you think", (JA 177). Actually, the head of Metropolitan News, Rosen, solicited Garfinkle at a higher price, to accept plaintiff's Mirror, but plaintiff, with Rosen's permission, offered same at a lower price for his network of outlets, direct. Rosen also failed to get Garfinkle to change. (JA 159) Other well know intermediaries also were unable to get Garfinkle to tell why he was so adamant. (JA 176) Likewise, Roy Cohn, personal attorney to Garfinkle (JA 175) and a number of mutual friends at Roy Cohn's home, which included Willie Levine, brother-in-law of Garfinkle, (JA 175) the enforcement-overseer for Garfinkle. However, Levine made it clear, that, while he was in a position, in Union News, to approve any publication for sale on Union News stands, his hands were tied as to plaintiff's Mirror; and even though Mirror could

be profitable to the Company. (JA 176) In that case alone, he was not free to use his judgment and normal authority, but he had to bow to Garfinkle's personal dictates, who said "No". (JA 176)

Levine said that Cohn's efforts with Garfinkle would be useless. (JA 176) Cohn then told Mirror's top man, Budin, that the rejection of the Mirror, and its removal from the Union News stands, was due to Daily News' influence, as a result of a deal made between Garfinkle and News Inc. (JA 176); and Budin said that would finish the Mirror. (JA 177)

This unsavory, collusive deal was but a continuation of the earlier shady relations, exposed by United States Government in suit of the U. S. v. Ancorp, Garfinkle, et al, in the Court below (70C 577, Bonsal D.J., S.D.N.Y. Opinion, Nov. 1973, JA 246), following the Federal Trade Commission complaints against the collusive acts of defendant News, et al., with Garfinkle, in violation of injunctive orders, granted after extensive hearings, (See this Court's decision, on appeal, in affirmance, U.S. v Ancorp, 74-1214 March 21, 1975), finding defendant Ancorp enjoying "market dominance" (JA23)

5. IN RELATION TO THE CONTENTS OF DEFENDANT NEWS INC.'S MOTION FOR SUMMARY JUDGMENT (May 5, 1975)

THE CONTENTS OF CO-DEFENDANTS' "ME-TOO" APPLICATIONS FOR SAME RELIEF

The motion papers, used by defendant News, Inc., in ostensible compliance with District Court Rule 9, contains a "Statement of Material Facts as to Which There is no Genuine Issue of Fact to be Tried".

We suggest that it cannot be described as less than a piece of effrontery.

For, the items 5, 6, 7, 8, are a completely self-serving pre-emption of plaintiff's case, proffered to provide the defendant, with the statutory entree, and to overcome the defendant's lack of any defense documents, which might supply affirmative support, or of any admissions by plaintiff, on file in the action , as set out in the FRCP Rules 8 (c), 12 (c) and 56.

Otherwise, also, the basic affidavit, for the motion, is by no principal officer of the defendant News Inc. It is an affidavit by Counsel, Mr. Geraghty, who claims no personal knowledge or participation in the events in issue or recited therein; but he does annex volumes of exhibits and volumes of

transcripts of testimony, including the examinations before trial, had by plaintiff, of defendant witnesses,-making no profitable references thereto in his own affidavit, in support of summary judgment for defendant.

And in simple "me-too" fashion, his co-defendants, by short, attorney's affidavits, adopt the News Inc. presentation, and demand judgment likewise.

In the sole, naive attempt of Mr. Geraghty, to come forward with a claim of "admissions" in the record herein, made by plaintiff, he has recited excerpts from plaintiff's answers by its chief operating officer and also attorney of record, Robert Farrell. Mr. Geraghty has singled out for quotation, a series of answers to questions, in both sets of interrogatories (JA 7, JA 10), typical of which is the following one:-

"7. Plaintiff is unable to answer, requiring being furnished by the defendants with the information by means of an examination before trial of the defendant; the allegations of the complaint in

their very nature being dependent upon such information now in the exclusive possession of the defendent."(JA 9)

Mr. Geraghty has utilised these answers, as in nature of "admissions", that the plaintiff, thus, "was not aware of any facts to support the central allegations of its complaint". (JA 39)

None of said plaintiff's answers was at any time made, or intended, by plaintiff to have such meaning. Wherever made, those answers were given to questions directed to secret operations by the defendants in conspiracy, by nature exclusively within defendants' knowledge.

Under head of "results of Discovery", Mr. Geraghty does not point to a single admission by plaintiff, supplying only negative, denialistic self-serving answers of his own witnesses. He argues and assesses, but furnishes no evidence in self-exoneration, by way of documents. On the other hand, plaintiff does herein point to many admissions out of their mouths, drawn from them in support of plaintiff's complaint; to all of which, Mr. Geraghty and his cohort counsel, are silent or disparaging. He offers three other brief affidavits, one of no probative

value (Schuman) and the other two of underling employees, related to single events.

The affidavits, accompanying respective notice of motion of co-defendants, also for summary judgment, are sparse submissions of no facts or evidence, disparaging plaintiff and its counsel; they are uniformly, by their respective attorneys, again as non-participants. In fact, one, for three defendants, Ancorp., American News, and Union News, was by mere bare letter of Roy Cohn, Esq., dated June 2, 1975, without copy to any counsel, and discovered only in file on June 19, 1975, reenforced by a tardy Notice of Motion, filed after decision, but pre-dated May 14, 1975.

6. IN RELATION TO CONTENTS OF PLAINTIFF'S APPLICATION IN RECUSANCE FILED MAY 29, 1975

6a. CONTENTS OF PLAINTIFF's UPDATED APPLICATION, DATED JUNE 17, 1975 IN RECUSANCE, UPON REPORTED LOSS OF THE ONE OF MAY 29, 1975.

In this case of novel impression, in recusance, under the new Section 455 Title 28 USC, (December 5, 1974) plaintiff submits to this Court that each affidavit be read verbatim, (JA 105 116 126 146) for appreciation of their sensitive appeal to the

District Judge, in the presence of growing "discomfort" (SJA 84) of the plaintiff as a litigant before Judge Frankel, (SJA 49) whose counsel invoked not only Section 144 of Title 28, United States Code, but also the recently, radically altered Section 455, of same Title. That placed an increased burden of initiative in the District Judge, to disqualify himself; no longer making his sense of "duty" (JA 90) to remain sitting and his "opinion" controlling, but rather the appearance of justice, objectively viewed.

We submit that this Court read the recusance affidavits, in full, (JA 70, JA 116) in light of his prememorandum. (SJA 82)

The second affidavit in recusance, was necessitated by, and recites the Judge's disbelief (JA 89) of plaintiff's counsel, in his declaration that he had filed the first affidavit on May 29, 1975 (JA 70-82). The Judge's decision of June 9, 1975 declares that (JA 91)

> "In order to reach and consider this question (of recusance) (including the location of the papers presenting it), I ordered the trial adjourned from June 9, 1975 to June 16, 1975."

Dealing thus with necessity of investigation of this unexplained, and mysterious disappearance of ,

and subsequent recovery of the document, the District Judge nevertheless ignored that self-expressed necessity, and proceeded to the entire matter of summary judgment on that very day, June 9, 1975, after assuring trial (SJA 32-JA 89-91)

Added to the foregoing, there was plaintiff's discovery, but not till June 19, 1975, that Roy Cohn had communicated with the District Judge, by ex-parte letter dated June 2, 1975, thus requesting summary judgment for his three clients-defendants; and there were also certain interim communications from the Judge, further disclosing evidences of his hostility and bias towards, plaintiff and its cause. (SJA 78)

It will be noted that plaintiff's affidavit of May 29, 1975, shows, we first, on crisis, sought conference at Chambers, but that request was brusquely refused. (JA 70)

7. IN RELATION TO CONTENTS OF PLAINTIFF'S AUTHORISED BUT UNDECIDED MOTION FOR FURTHER RELIEF IN DISCOVERY, AS ESSENTIAL PREPARATION FOR TRIAL HEREIN; FOR A COURT DIRECTION TO COMPEL COMPLIANCE BY DEFENDANT NEWS INC, WITH ORDER OF THE DISTRICT JUDGE TO PRODUCE FOR INSPECTION, THE CONTRACT OF SALE DATED OCTOBER 15, 1963, AND FOR DISQUALIFICATION OF ATTORNEY ROY COHN, TO ACT IN THE CASE, AS ADVERSARY TO PLAINTIFF.

That motion dated May 17, 1975, was authorised by two successive Memoranda of the D. J.

dated May 1 and May 6, 1975, (SJA 36-42) and made returnable May 27, 1975. Opposing affidavits were duly served, and the motion was submitted at Clerk's office, as is the practice below, on May 27, 1975.

To this day, no decision thereon was made; but, the District Judge instead granted summary judgment on the merits on June 9, 1975, leaving said essential motion in limbo.

(There are ample precedents for removal of an attorney from a case by disqualification, where conflict of interest is shown. (U.S. v. Bravo 75 CR 429, NYLJ 9-4-75; Hull v. Celanese 74-2126 CA-2, 3-28-75; Rotante v. Lawrence App. Div/2nd Dept., 12-5-74) This Court has unanimously held that any order dealing with counsel's disqualification is a final one, that may be appealed. (Silver v. Chrysler 74- .-4/29/74 NYLJ)

8. THE CONTENTS OF THE PLAINTIFF"S MOTION FOR VACATURE OF THE DEFAULT AND GRANT OF SUMMARY JUDGMENT, DATED JUNE 17, 1975, MADE RETURNABLE JULY 3, 1975, AND DEFENDANTS' ANSWERING PAPERS

Pursuant to Rule 60 (b) FRCP, plaintiff promptly moved after Judge Frankel's decision of June 9, 1975 for vacature, including the updated recusance application, containing a history of the action,

setting forth the causes of the delays in the action, all as recapitulated in letter to the Judge, dated April 26, 1975, and a full and lengthy affidavit of merits, made by the participant chief Operating officer of the plaintiff Corporation, reciting the history of plaintiff's publishing operation, from 1965 to 1971 inclusive, his relations with the various defendants, all as alleged in the Complaint, and in fact-by-fact proof thereof, culminating, demonstratedly, in the strangulation of plaintiff as a competing publisher of the defendant News Inc. (JA 146)

To all this, defendants served answering papers, that avoided answering, and avoided raising any issue of fact. (D-61,62; SJA AD 1)

The District Judge expressed regret in his decision on the merits (JA 91) that the Court would be deprived of plaintiff's side of the case. On July 3, 1975 the District Judge had the plaintiff's case, and on that very day, decided, by a cursory denial decision: evidencing no sign, that he had read or weighed the proofs of the plaintiff, now so detailed-

ly presented to the Court, as for plaintiff's day in court, and its bid for a trial, or for reverse judgment, as the case might be.

Upon our presentation, standing uncontradicted, we asked, for reverse summary judgment, and especially because the defendants appeared to have abandoned opposition, as required by Rule 56 (b) of FRCP, raising no triable issues.

THE ARGUMENT

POINT I

(a) WITH THE FILING OF PLAINTIFF's APPLICATION FOR RELIEF IN RECUSANCE OF THE DISTRICT JUDGE, HE WAS REQUIRED TO SUSPEND FURTHER CONSIDERATION OF DEFENDANTS' APPLICATIONS FOR SUMMARY JUDGMENT, PENDING HIS DECISION ON THE SUFFICIENCY OF PLAINTIFF'S APPLICATION, HAVING ITS OWN STATUTORY PRIORITY, IN THE JUDICIAL PROCESS, THUS PRECLUDING THE DECISION OF JUNE 9, 1975.
THE DISTRICT JUDGE COULD NOT DECLARE THE PLAINTIFF IN DEFAULT FOR A LACK OF PROSECUTION, BY REASON OF SUCH INTERIM EXERCISE, WITH DUE RESPECT FOR THE JUDICIAL DELIBERATIVE PROCESS.

(b) THE TOTAL OF THE INDIVIDUAL ENUMERATED ACTIONS OF THE DISTRICT JUDGE, THE DISTRICT JUDGE'S QUERULOUS AND RELUCTANT RECEPTION OF THE TIMELY MAY 29th, 1975 FILING, HIS IMPUGNING PLAINTIFF ATTORNEY'S VERACITY, THE JUDGE'S ADVANCE INTERIM COMMENTS DISCLOSING HIS PREDISPOSITION ON THE MERITS, OF THE PLAINTIFF'S CASE, AND HIS INSTANT BARE DENIAL OF PLAINTIFF'S PROMPT MOTION

TO VACATE SAID DEFAULT, THE GRANT OF SUMMARY JUDGMENT TO DEFENDANTS "ON THE MERITS" THEREON, NOTWITHSTANDING, REFLECTED HIS CONTINUING HOSTILITY TO PLAINTIFF, AND SERVED ONLY TO RE-ENFORCE PLAINTIFF'S ORIGINAL CLAIM OF BIAS.

(c) THE COURT HAD NO AUTHORITY OR POWER TO DISMISS, ON ITS OWN MOTION, FOR WANT OF PROSECUTION UNDER THE GOVERNING STATUTE. (FRCP RULE 41b)

We submit that there can be little or no question on the cumulative record, that the District Judge abruptly imposed summary judgment on the plaintiff as a penalty for its having moved for his disqualification. Even Rule 56 (f) could be construed as a bar to his grant of motion, so abruptly.

In Holt v. Va., 381 U. S. 131, that District Judge was reversed, as having been found to have punished the attorney with a fine of $50.00 for contempt, for having dared to utilize the remedy, provided by statute, in recusation of the District Judge. There The Supreme Court ~~held~~ held that the right to make motions is a part of due process, and that such right includes a motion to disqualify a sitting District Judge. In

Tumey v. Ohio, 273US510, 71 L. ED. (2), 550, the court also held that due process is denied by an existing bias.

It was so easy for District Judge Frankel to have dealt with the application in disqualification, filed on May 29, 1975 by extending the time of plaintiff's adjourned date for filing his answering papers, that is, from the next day, May 30, 1975 to a later date; precisely as he saw fit to extend the date of Trial, previously set for June 9, 1975 to June 16, 1975. (Rule 56 (f))

Thus the Judge himself, by withholding a new date for the filing of plaintiff's answering affidavits, was creating the pre-condition for declaring the default, and which, the plaintiff's attorney had forecast as gradually building up against him at the Judge's hands.

It would seem beyond doubt, that whatever brought the District Judge to his bias, as set out in the initial Application to recuse him,
the filing of the said application on May 29, 1975, was the culminating factor. In this private anti-

trust conspiracy action, for treble damages in $90,000,000, to which said defendant had pleaded only a general denial, the application in bias triggered a revealing series of ill-tempered expressions, and in advance and in final disclosure of his actual hostility to plaintiff's cause. (SJA-44 — JA 240 - SJA 76)

There can be no doubt that the District Judge had misdirected his irascibility (See our letter to the Judge of April 26, 1975 standing virtually undisputed; and our later reply for his accusing us of writing long letters and of delay. (SJA-33, SJA-49)

And when adversaries were obviously guilty of noncompliance with the Court's Order, the Court abstained but instead generally lectured both sides. (JA-57)

We here set forth his July 3, 1975 decision as good summarization of the Judge's conduct:

Frankel, D. J.

Plaintiff's motion filed June 30, 1975, and made returnable today seeks, "before a properly assigned Judge . . . or such other as may be assigned

for the hearing hereof, . . . an Order vacating ab initio the . . . Decision-Memorandum (dated June 9, 1975), and any Judgment entered thereon or to be entered thereon, as an extra-judicial act, a legal anomaly, a nullity in law, an abortive attempt of the Judge to effect a single, joint and concurrent disposition of two incompatible judicial processes, one in personal recusance of the deciding Judge, and the other in adjudication of the pending case, and as surprise product of undue haste, and a denial of due process, and for such other and further relief, by way of reinstatement of a time schedule for the further prosecution and defense of the within case, and otherwise as may be fitting in the premises."

The motion is denied.

It is so ordered."

His decision of June 9, was a commingled one, ignoring the mandate, statutory, and other priorities, (besides beclouding, in advance, his judicial course, as aforesaid. The authorities define his judicial duty in the premises, and will be shown hereinafter.

Section 144 of Title 28 USC, formerly section 21 of Judicial Code, mandates:

"Whenever a timely and sufficient affidavit .....he shall proceed no further, and another Judge shall be assigned.....

Section 455, of same Title, especially as most recently amended by Congress in response to popular demand for correction of the judiciary, is even more demanding of the Federal Judge, who has permitted his Court to suffer the loss of confidence of the litigant. That statute now eliminates the old dual concept of the Judge's "duty" to adhere to a case, if "in his opinion" he is fair, foregoing the subjective test in favor of the objective appearance, as against that subjective reality of the Judge's own mind, as he reports it. (See Legislative History, Vol. 3 (1974) Copy at p. 6355.)

P. 6355, referring to the amendment: reads that it is: "Designed to promote public confidence in impartiality of judicial process by saying, if there is a reasonable factual basis for doubting the Judge's impartiality, he should disqualify himself and let another Judge preside over the case. The language also has the effect of removing the so-called duty to

sit. (See Edwards v. U.S. (5 Cir) 344 F (2) 360 1964).

"Disqualification must have a reasonable basis."

"Litigants ought not to have to -- accept Judges where there is a reasonable question of impartiality, but they are not entitled to a judge of their own choice."

Even under the 144 cases, the Courts have long foreshadowed the present amendment on the obligation of the District Judge, as now prescribed in 455. In fact, also, the modernized Appellate Divisions, 1st and 2nd Departments, of the New York State Supreme Court of this Circuit, have literally adopted, as binding on, and for all, the numerous judges under their jurisdiction, Court Rules 609.1 and 700.1 respectively, reading in the language of the United States Supreme Court in Estes v. Texas, 14 L. Ed.(2) 543,550 (citing the Offuti case(348 US 11, 14)

"Justice must satisfy the appearance of justice."

And, so, the authorities have long held.

Judge Frankel will be seen, therefore, as having, in his rush to judgment, evidenced a result-

ant disregard of those authorities, hereinafter set out. Below herein, we shall set out the case authorities.

It should be noted, however, in fairness, that when District Judge Frankel dealt with the updated Affidavit in recusance of June 17, 1975, he did, this time, first dispose of that cloud (if only by reaffirmation) on his deliberations to come, on the merits of the motion to vacate, rendering his decision preliminarily on June 23, 1975. That short document also is of interest on this appeal.(JA-226)

The respective documents of decision of June 9 and July 3, 1975 were most remarkable,-the first for its length and the other for its brevity, merely reciting our Notice of Motion in haec verbis; the first for its deliberative endeavor, when premature, and the other for its avoidance of that obligation, when the bilateral opportunity therefor presented itself.

The question squarely presents itself: Was this a fair disposition in a fair tribunal? That is the ultimate one, as all the cases hold on the sub-

ject, of bias and prejudice, more accurately depicted herein as an affirmative hostility to plaintiff's cause.

Recusance herein seems to be a Case of Novel Impression, inso far as the newly amended Section 455 Title 28 USC.

There are repeated evidences in the Judges' June 9, 1975 treatment of the recusance application, that he had not yet become acquainted with the new liberalized requirements of Section 455 as amended by Congress on December 5, 1974, for the Judges' self-recusance.

Apart from his implied error that a recusance affidavit must be served on adversary, under either 144 or 455,- (a) he reverts to the now obsolete concept of a Judges' "duty" to adhere. (JA 90) (b) he still, in error, makes his own "opinion" and subjective feeling of justice being done as the test. (JA 90-1) (c) he omits the new "reasonable", "objective standard", (d) he refers to the "late date" of filing to wit on May 29, 1975 10-days before date of June 9, 1975, the date set for trial, (the statute fixes (10) days); (e) he refers to

plaintiff's dissatisfaction with "adverse ruling", when no complaint from the plaintiff appears in the record as to any ruling on decision made by the District Judge. (JA-91)

The manner in which he received the challenge of recusation was also revealing: First, he cast doubts upon the fact of filing, counter-attacking at the outset; and then while withholding his decision on that, constructing his decision on the merits under that very cloud. He withheld further, while he called upon and "invited" (JA-95) adversaries, for his own aid and comfort, (a step not authorised by either 144 or 455 of Title 28) only to find the plaintiff and its counsel in good-faith assertion. Adversaries obliged the Judge, naturally, (however irrelevantly), except we have called attention to their ineptness in so doing. (SJA 81) Most remarkable, the Judge, quietly accepted a most disorderly private letter of Roy Cohn Esq., addressed to the Judge, dated June 2, (JA- 63) during the first recusing interval; he also received from Cohn's law partner Bolan, an "invited" affidavit supporting the

Judge in his delicate and belcouded status and although Bolan had never appeared in the action,-a total stranger to the proceedings and all culminating in the Judge's threadbare denial of July 3. 1975, when the merits of plaintiff were on hand, undisputed. (JA-75)

SOME GENERAL PRINCIPLES FOR JUDICIAL DISQUALIFICATION

While the Federal Judge must pass upon his own bias, his decision thereon is subject to review by this Court, as part of the final judgment, except in rare cases, where a mandamus application may be made (Koner v. Hoffman C.A.-1 1954, 212 F (2) 211; Hurd v. Letts 152F (2) 120); mandamus to this Court being permitted in special cases (re: Lisman CA-2 89F (2) 898).

An advance display of a "bent of mind" by the District Judge, disqualified. U. S. v. Townshend 418F (2) 1072 (1973)

The statute is designed to prevent any appearance of lack of impartiality. U.S. v. Valenti 120 F Supp. 80; Mitchell v. U.S. 126 F (2) 550.

The Judge by his own example must confirm the objectivity and majesty of the judicial process, (U.S. v. Conaglia (1973) 472 F (2) 160. The "public" should have the "assurance" of fairness. (Connally 191 F (2) 692, 7)

While herein, Judge Frankel favorably passed upon the "good-faith" of the plaintiff and counsel, that was a gratuitous and not a legal, authorized excerise. (C.A. Penn. 1973 478 F (2) 1072)

A District Judge who had been personally approached, may well disqualify himself. (US v. Homer, 149 F SuPP-----)

While any one fact by itself might be insufficient to disqualify, all taken together, could appear sufficient for disqualification. (US v. Zerilli 1971 DC Calif. 328 F SuPP 706) (Even while the Judge therein denied bias, he disqualified himself sua sponte in the interest of justice's appearance). The Judge was disqualifiable for participation on the accusatory process (re: Murchison 349 US 133); herein attacking veracity of plaintiff's attorney. (JA-82, JA-89)

The obligation of the Judge to first deal with the application to disqualify himself is set out

in Bradley v. School Board (1971 DC Va.) 324 F Supp 439: (treating with Section 144)

> "Where the affidavit in disqualification is filed, the presiding Judge has the task of determining as a matter of law, first whether the party's affidavit is timely filed, whether the same makes the requisite allegations as required by the statute and whether such allegations proved fair factual support for the belief that bias or prejudice exists." (citing Beyer v. U.S. 255 US 22, 41 S. Ct. 230, 65 L. Ed. 481 (1921)" (It should be noted however that the Bradley decision ante, also on 455 analysis, became obsolete with its 1974 amendment.)

In Hodgson v. Liquor, 444 F (2) 1344, 8 this court held: emphasizing the need to avoid the appearance, as well as the actual existence of bias,

> "the Trial Judge must at the outset determine whether the facts so stated would constitute legally sufficient grounds for recusal (Citing the Supreme Court case of Berger v U.S. ante, and others of this court, Rosen v. Sugarman 357 F2 794 et al.)
>
> Also strongly to same effect, De Rau v. Killets, D.J., CCA-6 (1925 --F (2) --)

In Com. of Pa. v. Local Union 388 F Suff. 155 decided on the very day that Congress made the Amendment to Section 455 Title 28 USC, the Judge, refusing recusal at p. 182, nevertheless pointed to

the obligation on him to,

> "refraining from further proceeding until there was a definite ruling by the Court of Appeals. Such a delay would be unfortunate, since this case is three years old and probably the oldest triable case on any docket. But because of the personal nature of these motions, I would await Appellate determination, if such writ were sought."

In Carroll v Zerbst 76 F 2961 (CA-10) the initial effect of the filing of the affidavit under Section 144 was treated:

> "The affidavit (under 144) did not divest the Court of jurisdiction of either the subject matter or the person of the defendent. It merely affected the power of the Judge against whom it was directed to proceed further with the case. It was directed against Judge Sopen...."

However the Bradley (ante,) case, goes on to hold most pertinently for the facts in case at bar:

> "When a recusal motion lacks the statutorily required support, a Judge must give it due consideration. For any such motion if presented in good-faith indicates a fear on party's part, that this trial may be conducted without full regard for his rights and interests."

Judge Frankel protested his unawareness of

any emotion and disclaimed knowing plaintiff's attorney, referring not at all to adversaries: (JA 91)

Re: Murchison 347 US 133 ante, at p. 136 however held:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias, but our system of law has always ENDEAVORED to prevent EVEN THE PROBABILTY of unfairness." Circumstances and relationships must be considered. (Citing the Tumey case, ante, ...Such a stringent rule may sometimes bar trial by Judges who have no actual bias and who would do their very best to weigh the scales of justice between equally contending parties, But to perform its high function in the best way, Justice must satisfy the appearance of justice, Offutt v. US 348 US 11, 14". So also held this Court in Hodgson v. Liquor 444F (2) 1344, 8, ante, ruling that appearance of unfairness must be avoided.

When a judgment is rendered by a District Court in violation of the "basic principle" requiring an absence of bias, such judgment must be reversed. So held the Supreme Court in the Murchison and Berger cases (ante), as cited in Knapp v. Kinsey (6 Cir) 1956 232 F (2) 458.465.

This Court in Pariser v. City of New York (146 F (2) 431,3) held that the District Judge should exercise self-restraint and preserve an atmosphere

of impartiality holding:-

> "When the remarks of the Judge during the course of the trial... clearly indicates a hostility to one of the parties or an unwarranted prejudgment of the merits of the case, or an alignment with one of the parties, the Judge indicates, whether conscious or not a personal bias.....Crone v. Di Marco 1 Cir. 225 F (2) 652.....

This Court held in Rosen v. Sugarman 357 F (2) 794, (1966) that,

> "if any antipathy has crystallized, where an attorney can do no right, the Judge will have acquired a "BENT OF MIND" at least bias matter where the attorney's private interests are at "stake". (citing case)

We submit, that, in the case at bar, the District Judge, having dealt unilaterally with the merits on June 9, 1975 may be said in the words of the Court in the Knapp case, at p. 467 (ante),

> "he, figuratively speaking, stepped down from the bench to assume the role of advocate for the plaintiff".

Section 41a FRCP provides for dismissal "by order of Court," having no application herein; but section 41b governs. It reads pertinently but limitedly:

"a defendant may move for dismissal of an action or any claim against him".

Not only did no defendant move for dismissal, but on the contrary the defendant News Inc. joined by the others, was inviting the filing of more papers by the plaintiff on its motion for Summary Judgment (D-41); and further in its later affidavit of June 6, 1975 in connection with recusance. (JA 96)

It should here be noted in passing, that the District Judge and counsel for the defendant News were at strange loggerheads. While the District Judge was declaring the plaintiff and his counsel in good faith and credibility, in bringing the application in recusance, Mr. Geraghty, attorney for the News was attacking the plaintiff and its counsel, as in bad faith, for using the application as a device to obtain delay "by any means" (JA-101).

And while the defendant News was twice urging the plaintiff to take its time and submit further papers and evidence, namely, on May 5, 1975 and June 6, 1975, (JA-102) the Judge was arbitrarily and contrarily cutting off the plaintiff from its day in court, set last by the Judge for May 30, 1975, one

day after the filing of the recusance application.

So likewise, plaintiff was bound to wait on that priority of judicial dispositon, with plaintiff's filing of its recusal application, and could not consistently submit, at same time, answering papers, to its recused judge, until The Judge had disposed of it, one way or another. Else, obviously, to submit further papers, is to raise serious questions of waiver of the recusation. Plaintiff and judge alike were precluded in law from devoting themselves to the merits and to the adjudicative process, while confronted with the incompatible priority judicial challenge of recusation.

Obviously, The Judge, when extending the date of trial in the reasonable exercise of discretion to the 16th June, 1975, as he announced preliminarily (JA-83) in his own relief, as Trial Judge-to-be, should have given similar relief pro tem to plaintiff by adjourning its date for filing answering papers until after his disposition of the recusation. (See FRCP Rule 56 (f) also)

The recent opinion of this Court rendered on August 6, 1975, reported in the New York Law Journal on August 20, 1975, front page, in Finley v. Parvin-Dohrmann is here cogent in a number of respects, having like relevant elements with respect to the operation of rule 41(b) FRCP:

In that case, discovery was being considered in a five-year unprosecuted action, delayed by its plaintiff or avoided; in the instant case, we were pressing hard for discoveries and were flouted by adversaries, with the District Judge's indifference thereto, even at the very moment of his grant of his dismissal.

In the Finley case, the Court treats approvingly with the ease of access to the District Judge, by telephone in facilitation of setting a trial date under the IAS System rules, of the District Court. In our case, where plaintiff and counsel approached Chambers for conference on the developed trial bias crisis, that approach was cursorily rejected by Chambers. (JA-70-1)

In the Finley opinion, this Court refers to the District Judge's "discretion" confided to him.

5 Moore Federal Practice Par. 4, 11 (2) at III J 1125 (1974). But in our case, it was statutory obligation, calling for compliance, by the District Judge, and his abuse of ordinary reasonable discretion in re-setting of dates accordingly. What we got was an "arbitrary, forceful and unreasonable" response, an abuse of discretion where "no reasonable man would take the view adopted by the Trial Judge." (citing Delno v. Market St. Revy 124 F (2) 965, 7 (9 Cir. 1942)

This Court therein also refers to another definition of "abuse of discretion" used in Carroll v. Am. Federal of Mo. 295F (2) 484, 488,9 (2 Cir. 1961):

> "abuse of discretion" is a phrase which sounds worse than it really is. All it need mean is, that when judicial action is taken, in a discretionary matter, such action cannot be set aside by a reviewing court, unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors.....

It is also significant that a dismissal with prejudice (or even without prejudice, if the statute of limitations has run) is a VERY HARSH

SANCTION (See Sec. 9 Wright & Miller Fed. Practice & Procedure Sec. 2369 at 193-99 (1971).

This Court went on to refer to

> "a denial of a third motion to dismiss, made under these circumstances which the majority held to be an abuse of discretion."
>
> The Court also points out what is herein relevant that the Judge could give some weight that the defendant's failure in this case.....to bring the delay to the District Court's attention";

in our case, no one was complaining of any delay by the plaintiff. Therefore that element's absence a fortiori, only aggravates the unreasonable actions of the District Judge below by the standards applied by this Court toward the end of its lengthy opinion.

It is additionally significant that this Court ruled that

> "the Judge might consider allowing the defendants any discovery that can be completed before the October 6 trial date, if they wish to have it."

In our case, the District Judge left authorized applications for further discovery undecided, and withheld enforcement demanded by us of discovery, already directed by the Judge against our adversary News Inc., included within that motion in a seemingly afterthought footnote (JA 89)

POINT II (a)

THE DISTRICT JUDGE WAS PRECLUDED FROM GRANTING, OR EVEN FROM ENTERTAINING DEFENDANT' APPLICATIONS FOR SUMMARY JUDGMENT ON FINDING THAT ON THEIR FACE, THEY WERE DEFECTIVE, IN THAT THEY RESTED UPON NON-EVIDENTIARY, ATTORNEYS' AFFIDAVITS, ONLY ARGUMENTATIVE OR EVALUATIVE IN NATURE, OR WORSE, BEING BARE EX-PARTE ATTORNEY"S LETTER TO THE DISTRICT JUDGE, FOR SUCH RELIEF.

INSTEAD OF REJECTING SUCH OBJECTIONABLE PAPERS, AS STATUTE AUTHORISES, HE DECLINED TO ACCEPT OPPOSING PAPERS WHICH WOULD EXPOSE THEIR SHAM, UNETHICAL AND ARROGANT NATURE,

AND AFTER EXPRESSING JUDICIAL REGRET THAT HE WAS BEING DEPRIVED OF THE OPPORTUNITY TO RECEIVE ANSWERING PAPERS OF THE PLAINTIFF, WHEN HE DID RECEIVE THEM ON MOTION TO VACATE DEFAULT, HE THEN AVOIDED THEM BY ABRUPT DECISION OF DENIAL OF THE MOTION, IN HAEC VERBIS TERMS, ON THE VERY RETURN DAY OF THE MOTION, JULY 3, 1975. (244)

While the defendant News alone submitted a lengthy affidavit as its basis for summary judgment, it was by its attorney; it was not made, or offered, upon any personal knowledge of the facts, it tendered no legal evidence as might be admissible on a trial or competent as such. (FRCP Rules 56 (e) and (g)

Such submission is not only unauthorised by the governing statute, Rule 56 (e) but, failing to meet the Rule's conditions precedent it may be rejected at the outset with sanctions by the Court

presiding. (56 g) We think there is no need to cite supporting cases under 56 e and g.

The other four defendants, alike, came forward with only their bare attorneys' affidavits, making no pretense at compliance with the statute, arrogantly depositing their slim papers, with the District Judge; one of them, Roy Cohn Esq., for three defendants (Ancorp., American News, and Union News) first by bare personal letter direct to the Judge, and then by notice of motion, dated June 10, 1975 affidavit filed after the decision of June 9, 1975, on June 10, 1975, with affidavit questionably back-dated to May 14, 1975. The entire co-defendants' four submissions were a pure "me-too" blind paper adoption of the defendant News' submission.

The one attempt, of Defendant News to offer material of an affirmative character, in theoretical exoneration, which might support its negative pleading of General Denial of plaintiff's complaint, consisted of alleged admissions against interest on file in the action, to be found in plaintiff's answers to defendant News' interrogatories. On closer examination however, none such will be found.

Counsel for the defendant News has naively construed certain time-honored forms of answers as admissions, of a plaintiff called upon to answer to interrogatories, designed to elicit information from plaintiff as to alleged secret conspiratorial acts of defendants, as alleged in the Complaint. They are essentially so alleged of course upon information and belief being secret operations of the defendants, of which they alone can be directly informed. However from the circumstantial results thereof, inferences can be drawn.

And the Judge, in his decision erroneously accepted defendant's construction. (JA-92)

Admissions against interest are one of a number of affirmative defense items enumerated in the Federal Rule 56C, governing possible dismissal of complaints at instance of a defendant-movant on the merits, the others being documents setting forth such pleadable defenses as res adjudicata, collateral estoppel, satisfaction and discharge, release, etc.

Defendant News has referred to a number of such responses, in both sets of our answers to its interrogatories, (JA-6-9)

7. "Plaintiff is unable to answer, requiring being furnished by the defendants with the information by means of an examination before trial of the defendant; the allegations of the complaint in their very nature being dependant upon such information now in the exclusive possession of the defendant." (JA 9)

These have never been considered "admissions", or evidence of the poverty of a plaintiff's case.

On the other hand, we have obtained numerous admissions in abundance, from the examinations before trial, which plaintiff conducted, lending support, or direct proof of the material allegations of our Complaint from the mouths of defendant principals. But these seem to have escaped the Judge and opposing counsel and again in the two decisions on appeal.

We cite here typical case authorities demonstrating the point involved:

It is a long-time and well established practice, that upon a demand for Bill of Particulars, with respect to allegations, not within the direct knowledge of the plaintiff, the responses to such questions necessarily take on the form employed by

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this plaintiff. (See-----Burns v Hayes 217, 193M503;
Chittenden v San Domingo 132 AD 169 (1st Dept);
Weinberg v Berkshire 196 AD 364 (1921) (1st Dept).

See also Berkley v. Newman Realty (D. C. Mo. 1963) 33FRD 516;
(citing Poller v. Columbia Broadcasting System, Inc. 368 US 46", 82 S. Ct. 486, 7L.Ed. (2) 458)

Rule 26 FRCP on Scope of Discovery reads:-

> "It was not ground for objection that the information sought will be inadmissible, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

In fact, it is in such manner that conspiracies in anti-trust violation cases are provable, and alone are proved.

In Poller v. Columbia Broadcasting System, Inc., ante, 368 US 464 at p 473, the Supreme Court points out that in anti-trust cases,

> "the proof is largely in the hands of the alleged conspirators."

The authorative text is here cited of Toulman on'/ i Trust Laws' Vol. 6 pp 605 et seq., Sec. 19.10 Vol 6 p 607-8 declares:-

"A conspiracy may be proven by circumstantial evidence. Conspiracies are seldom capable of proof by direct evidence and may be inferred from the things actually done and from the circumstances."

.....

"No actual proof of conspiring is any longer needed in government prosecutions of anti-trust violations" citing Interstate Circuit v. U. S. 306 US 208

"Each member with knowledge of what the others were doing responded the same way to a common stimulus. This was presumed, to constitute a conspiracy." "Toulman Vol 6 Introduction"

POINT II (b)

THE DEFENDANTS' JOINT APPLICATIONS FOR SUMMARY JUDGMENT MUST BE DEEMED IMPERTINENCES IN LAW

Beginning with a prerequisite "Statement of Facts not in Issue" as prescribed by District Court Rule 9 (g), which contains no such material facts; and then accompanied only by non-party attorneys' affidavits, of a non-evidentiary nature, in basic support of the applications; and worse, a direct ex parte letter to the Judge, arrogantly asking for that sweeping relief, (from attorney Roy Cohn Esq.) for three of the co-defendants; these must all be deemed of a piece, deemed frivolous submissions, frivolously conceived, and presented in bad-faith; and as such they must be deemed subject to the authorized sanctions within the contemplation of FRCP 56 g. Items No. 5,6,7,8 and 9, are not and never were admitted, as set out by the defendants Court Rule (9.g) Statement; and none of the basic affidavits fit within FRCP 56 (e) requirements.

The ex parte approach by Roy Cohn Esq., to the District Judge, dated June 2, 1975 (JA 63), not discovered by plaintiff until after June 19, 1975

with, and so accepted, by the District Judge up to the day of his decision, June 9, 1975 and beyond, brought from plaintiff's counsel his "shocked" telegram dated June 19, 1975 (JA 64). It is referred to by the District Judge in his June 23, 1975 second decision in rejection of recusance, without comment (JA 226).

This series of submissions, the last one of Roy Cohn's law firm, filed by them June 10, 1975, only after the decision, (JA 65) are in arrogant pattern with the defendant News' withholding of the key Contract of Acquisition of October 15, 1963, in defiance of the order of the District Judge, now being passive in contrast, although its full submission to Court and plaintiff was also essential to the agreed objective of a pre-trial focussing of issues for the Trial Court. (JA 71)

The ex parte letter of Roy Cohn Esq., dated June 2, 1975, received by the District Judge, must come within the "Ethics Opinion", made public on September 10, 1975, by the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, which "concluded" that

"'the general rule' is that it is unethical for a judge to receive and consider and for attorneys to make ex parte submissions." (citing an irrelevant exception to the "rule") (all as reported in the N. Y. Law Journal, front page on September 11, 1975).

POINT III

SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS DOES NOT LIE IN ACTIONS WHEREIN DEFENDANTS ARE CHARGED WITH CONSPIRACY, FRAUD, AND OTHERS, WHEREIN INTENTION AND MOTIVE ARE INEVITABLE MATERIAL ISSUES OF FACT, THAT MUST GO TO TRIAL, FOR THE COURT AND JURY TO DETERMINE, FROM HEARING THE WITNESSES.

The foregoing principle is well established, for actions involving anti-trust law violations. In fact, the District Judge at once so expressed himself, when he granted defendant News' counsel's request, peculiar as it was, to be allowed to make such a motion in place of the device called for, by the Judge initially, for focussing the issues for the sure forthcoming trial to wit, the Pre-trial Memorandum. (JA 87)

In fact the District Judge openly declared, that, while the defendant News counsel's request was rare, to substitute a motion for summary judgment, as a device in place of the scheduled Pre-Trial Memorandum, for advance focussing of the issues for the trial Judge, such motion would in all probability not be granted; such motion being indeed a rarity in a anti-trust violation conspiracy case. (JA 87) Particularly in this case, where the defendant News, had pleaded only general denial, no affirmative defenses of

exonerative documentary evidence, or any material admissions by plaintiff, such as appear enumerated in Rule 56c, Rules 8c, and 12c, of FRCP governing dismissal of complaints on the merits. The one and only, affirmative defense,- of the 4 other defendants, originally alleged in 1971,- seems altogether now abandoned and waived in the test- imony of their principals before trial herein, and on their recent nominal motions of "me-too" nature, for summary judgment.

In fact, The District Judge was only voicing the authoritative opinion, of the U. S. Supreme Court, in Poller v. Columbia Broadcasting System (ante) 368 US 464,73, wherein appears the same holding:

> "We believe that summary procedures should be used sparingly in complex anti- trust litigation, where motive and intent play leading roles, the proof largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only where the witnesses are pres- ent and subject to cross-examination, that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury, which so long has been the hallmark of even hand- ed justice."

It has long been established in State and Federal Courts, that actions whose allegations depend for proof, upon evidence of the intent and motives of

the parties, as in fraud, conspiracy, anti-trust violation case, are not candidates for initial summary judgment. The cases are legion, and need not be added to this authority of the U. S. Supreme Court, e.g., Parker v. Rogerson, 33AD 284; Buschman v. Diamond, 35 AD (2) 926; Woolworth v. Davis, 34 AD (2) 1065; First National Bank v. Pepper, 454F (2) 626.

In the Poller case, at p. 474, quoted content of the main affidavit, like that of Mr. Geraghty's, herein counsel for the defendant News Inc., comes in for disparagement:

> "there is not a shred of evidence to support the charges."

It is condemned for obvious inadequacy, on which to predicate an affirmative judgment of dismissal.

This Court recently denounced a grant of summary judgment, without a hearing, as denial of due process, in case of Calo v. Paine, Aug. 18, 1975, NYLJ, Sept. 5, 1975.

The text of Walther Barthold (Prentice Hall 1975) in "Attorney's Guide to Effective Necessary Techniques", at p. 33 declares:

"Disposal of a case on the merits is, of course, the goal of every motion for summary judgment. Factual affidavits of admissible evidence by competent witnesses must support the motion.....

> No ethical lawyer moves for summary judgment without what he considers adequate grounds. A court might well not require a response to a sham motion."

We think that the herewith annexed case report of appeal (CA-2 75-7230) (Front page, NYLJ October 28, 1975) has a special relevance here. For, if criticism for undue haste is the thrust and gist of this now renewed, condemnation of the Chief Judge's opinion for this Court, then, seldom indeed if ever, has there been such offense, and in the triple form, which it has assumed herein.

For, in the precipitating judgment below, the District Judge had, compoundingly, also to hurdle:

(a) The command to halt, of the invoked 144 bias statute;

(b) His own solemnly professed "regret" that, for that presence only, indeed, he would be unable to receive the other withheld side of the case for his deliberation; and

(c) His own assurances of a necessary trial to follow, for which the case was "destined" (5JA 32);

and all, climaxed by his final court refusal to duly make findings of fact and conclusions of law, when, in due process, he, on July 3, 1975, did receive that other side, and for the first time, and also adversar-

ies' opposing affidavits, which in fact, offered no opposition to raise any triable issues of fact, to bar plaintiff's right to summary judgment.

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Circuit Court Again Cautions District Judges

District judges within the Second U.S. Circuit have been cautioned again on the "inappropriate" and continuing granting of summary judgment in cases where it is not called for, in conflict with the Federal Rules of Civil Procedure.

The admonition came from the Second Circuit Court of Appeals which reversed an order granting summary judgment to an insured in a fire-claim dispute.

Chief Judge Irving R. Kaufman, in his opinion for the three-judge panel, emphasized to the district judges that under a prior court holding "the 'fundamental maxim' remains that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried."

Spirit of Rule

Furthermore, Judge Kaufman said in the decision, *Heyman v. Commerce and Industry Insurance Company*, 75-7250 Oct. 24, "when the court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought." This, he emphasized, is the "spirit" of Rule 56 of the Federal Rules of Civil Procedure.

Rule 56, he explained, is merely a "tool" under the summary judgment procedure "which enables the court to determine whether the 'curtain' should rise at all" and whether a trial is warranted. Concurring in the opinion were Judges Henry J. Friendly and J. Joseph Smith.

Background of Case

POINT IV

PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THE COMPLETED RECORD, SUBMITTED BELOW, IN ITS VIRTUALLY UNDISPUTED, AND ABANDONED STATE, SUBJECT ONLY TO HEARING OR TRIAL, REMAINING, ON ASSESSMENT OF DAMAGES SUSTAINED BY PLAINTIFF, AT HANDS OF DEFENDANTS.

When a party asks for summary judgment, going outside the pleadings, the door is thus opened for similar demand by the other side, both sides thereby agreeing that there is no remaining issue of fact to be tried, and that the matters may be decided as a matter of law with grant of summary judgment to either. (FRCP 12 c and 56 c).

In the case at bar, the defendant News Inc. pleaded only general denial, but came into Court for summary judgment, merely generally and negatively positing that no proof had been offered by plaintiff in support of its complaint.(JA 41 p.23) Rule 56 (e) bars reliance by defendants upon a negative presentation. We have shown that the sole affirmative presentation, of alleged "admissions on file" by plaintiff, in form of interrogatory responses, and its Rule 9 (g) "Statement of Facts Not in Issue" lacked both legal and factual basis.

However, plaintiff came forward on motion to vacate with weighty affidavits of merits, with direct legal evidence, making further use of adversaries direct evidence, as offered, of the various sworn oral admissions of the defendants' principals and agents, and employees, adduced on examination before trial, and of other documentary proofs, coming from the possession of the defendants. The defendants, not one of them, took to dispute or to deny any part thereof in purported opposition papers, (D-61-2 SJA AD #1) except to cast abuse upon the plaintiff and its counsel. They did so in presence of the broad opportunity, again, given by that Rule, to "set forth specific facts showing that there is a genuine issue for trial"; with proviso, however, that

> "if he does not so respond, summary judgment, if appropriate, will be entered against him".

As on the first motion, their own, so on the second, ours, they seemed careful to avoid facts.

Appellants propound, therefore, that, in this completely submitted state of the record before this Court, plaintiff should have interlocutory judgment as provided by Rule 56 c, subject to later hearing or

or trial for assessment of damages. Even the co-defendants, who pleaded an affirmative defense, in a single pleading, failed to support that defense with any evidence, when its time arrived.

Thus, plaintiff's evidence stands virtually uncontradicted; the defendants have raised no issue of fact for any trial. The evidence as it stands, as we shall show, fulfills plaintiff's burden of proof; the consummated strangulation of plaintiff's business and publication, Daily Mirror, at hands of the conspiring defendants, as plaintiff has alleged by Complaint, has been proven, to entitle plaintiff to a reverse summary judgment, on the merits.

The District Judge, on receiving from plaintiff and defendants, their respective filed submissions, on July 3, 1975, the day fixed for submission, short-shrift, denied the plaintiff's motion, by decision dated that same day; he denied it, by merely quoting the notice of motion in haec verbis; and thus, this Court, on this appeal, was deprived of any judicial statement of his rationale, on our full submission, and of course, any findings of fact, or conclusions of law, from which this Court, or the parties might be guided.

We have stated that plaintiff has sustained its burden of proof, that the plaintiff's Mirror was eliminated as competitor, by defendants' joint strangulative efforts, by a system pursued, by them in concert.

We have evidenced:-

(a) The business and profit motivation of the defendant News Inc.
(b) The common motives and interest of co-defendants to join the plan of the News Inc. to destroy plaintiff.
(c) The notorious character of the member personnel of the conspiracy, necessary for consummation of such a scheme, established also by Court decision, showing the predatory and "dirty-tricks" practises of the industry, under the defendants' substantial control.
(d) The opportunity, at ready hand for consummation, including the current social relations between the defendants' top personnel.
(e) The consciousness of guilt betrayed by the participants in the plan, by
    (1) Obviously false, and self-contradictory and inter-contradictory answers of the parties on same matters;
    (2) The consistent recourse to denials that plaintiff was a competitor, and belittlement of their own activities, and their lack of concern for plaintiff as a competitor, unnatural to the situation.
    (4) Their sworn admissions: the admitted disappearance of office records made and kept by Defendant News covering investigation field reports on the Mirror's market and circulation;
    (4) The tacit "as alleged in our Complaint (JA 3) specific cryptic, 'code'

conversations had between the defendants' key principal of life-and-death importance to the plaintiff, and then also between News top executive of the defendant News and its top counsel; (JA 278-437) and the culminating act of that same counsel's office, on present occasion below, in its defense against this lawsuit, by way of a specific oath in cover-up, counsel's main affidavit of May 5, 1975 for summary judgment for client-defendant News. (JA 41); thus coming full circle in this year 1975, since that same law firm's co-authorship for that same client, of the key "basic" document (JA 227), still being withheld against Court order,-the Contract of Acquisition of October 15, 1963.

(f) The defendants' abandonment of answer to plaintiff's motion to vacate default, and for reverse judgment in plaintiff's summary favor.

(g) The submission of the attorneys for the defendant News Inc., from the head of the News Inc., that no need existed to enforce the threats of legal action against this plaintiff, contained in said threat letters, because the News felt that the plaintiff was doomed by other co-existing conditions, not disclosed. (JA 437)

We believe that this most present cover-up event (#4 see above) needs a corroborative detailed recital here.

We first quote counsel's specific sworn statements paragraph 23 (a) and (b) (JA 41). We here underline the portions, not to be found in words or

substance, in the actual transcript of the two to defendant witnesses being thus treated.

> 23 (a) In his deposition, Mr. Garfinkle was asked repeatedly if he ever talked to anyone at the News about the Daily Mirror. Mr. Garfinkle's testimony was, that he did not recall having any such conversations in this regard, and that during a conversation he had with Mr. Underwood on a subject completely unrelated to the Mirror, Mr. Underwood asked why he was no longer distributing. This conversation took place after the Mirror had been removed from the Ancorp newsstands.
>
> (b) In his deposition, Mr. Underwood, a member of the Board of Directors of the News and its Director of Sales, was asked repeatedly, if he ever talked to anyone at Ancorp about the Mirror. Mr. Underwood testified that he recalled one conversation with Mr. Garfinkle in which he asked Mr. Garfinkle why the Mirror was no longer on Mr. Garfinkle's newstands. Mr. Underwood testified....."(JA 41)

We now provide the transcript testimony, first of Underwood, a director and circulation Head of the Dept. News Inc: and then of the deft Henry Garfinkle, the chief operating officer of the three co-defendants, for the subject period of this lawsuit.

However testimony of Underwood: (JA 277 8, 280) shows not a single question was put, or answered, in the context and manner, as sworn to by counsel.

Similarly Garfinkle's (JA 334) oral examination in October, 1973 discloses no such question was

put to him, and on the contrary he swore that he had never talked to Underwood, for the past 3 years. (1969-73)

We suggest that this act of oath, emanating from the office of the defendant News counsel, is a far-out premeditated restructuring of the record, to avoid, for their powerful clients, the liability of reverse summary judgment in this private (Ninety Million dollar) treble damage action.

The ten-year contract herein at bar, to surpress the predecessor Mirror of 1963, and to create and preserve restraints and movements toward monopoly in a relevant market, where the defendant News is already in a commanding position therein, achieved a drastic lessening of competition and enabled defendant News Inc. to, as was intended obviously, to realize a reasonable probability of anti-competitive consequences,-to adopt the language of the U. S. Supreme Court in U. S. Dupont, 353 US 586--"which may be at, or anytime after the acquisition....."

It is clear that the acquisition by defendant News Inc. was offensive to the statutes in its intent and spirit; and its sub rosa actions of the

defendant News Inc. concert with the other defendants, were thus to compound the original, intentional, secret violations, with the creation of the Contract, bringing the treble damage liability herein sued for.

The Sherman Act (15 USC 1) makes and declares "every contract and combination or conspiracy in restraint of trade or commerce among the "several states" to be illegal"; further making

> "every person who shall make any contract or engage in any combination of conspiracy hereby declared to be illegal, shall be deemed guilty of a misdemeanor....."

and subject to penal sanctions of fine and imprisonment.....

In Lektro v. Vendo Co. (1975-2 Trade Case Part. 60 (418) as reported in N. Y. Law Journal, on September 19, 1975, it was held that a "10-year covenant" not to compete was unduly broad and hence illegal under Section 1 of the Sherman Act, "primarily directed at the elimination of competition rather than protection of good-will", as in the case at bar.

The Dupont case (ante) further pertinently held (at p. 594):

"A monopoly involves, the power to.....

exclude competition when the monopolist desires to do so. Obviously, under Section 7 of the Clayton Act, it was not necessary.....to find that (the defendant) has actually achieved monopoly powers.....but that it came

> "measurably close to that end. For it is the purpose of the Clayton Act to nip monopoly in the bud."

and at page 597:-

> "The Clayton Act was intended to supplement the Sherman Act. Its aim was primarily to arrest consequences of inter-corporate relationships before those relationships could work their evils."

Addiston Piper v. U.S., 175 US 211 held that a combination, effectively excluding or trying to exclude outsiders from the business altogether, is a monopoly, or an incipient monopoly, and thus is unconditionally unlawful.

Thorcer v. Union Castle, CA 2 16F (2) 251, 3, declared it is as unlawful to prevent a person from engaging in business as it is to drive a person out of business.

In A. B. Dick v. Mow (D.C.,N.Y.) 9 FRD 90, it was held that a decree in an action by the

United States for violations, is prima facie evidence against the defendant in a subsequent suit for treble damages, if the prior litigation offers background as to the nature and extent of the conspiracy charged.

CONCLUSIONS

1. THE DISTRICT JUDGE WAS PRECLUDED FROM DECIDING, OR EVEN ENTERTAINING, DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, UNTIL THE APPLICATION FOR HIS DISQUALIFICATION HAD BEEN DECIDED; AND COULD NOT LEGALLY TAKE PLAINTIFF'S DEFAULT, OR DECLARE PLAINTIFF GUILTY OF LACK OF PROSECUTION FOR MERELY WAITING ON THAT PRIORITY DECISION, AND WAS WITHOUT POWER OR AUTHORITY ON HIS OWN MOTION TO DISMISS FOR WANT OF PROSECUTION, UNDER RULE 41 (b) FRCP, UNDER THE CIRCUMSTANCES.

2. THE DISTRICT JUDGE'S BARE AND CURSORY DENIAL, OF PLAINTIFF'S IMMEDIATE RESPONSIVE MOTION TO VACATE HIS UNILATERAL GRANT, MAY WELL HAVE REFLECTED AND REAFFIRMED PLAINTIFF'S CLAIM OF EXISTING BIAS AND HOSTILITY.

3. JUDGMENT, AND THE DECISIONS MADE UPON THE DEFENDANTS' APPLICATIONS FOR SUMMARY JUDGMENT SHOULD BE VACATED, THE DISTRICT JUDGE HAVING BEEN PRECLUDED FROM ENTERTAINING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, ALL RESTING ON EITHER AN ATTORNEY'S BARE ARGUMENTATIVE AFFIDAVIT OR AN ATTORNEY'S LETTER OF REQUEST FOR SUCH RELIEF.

4. THIS COURT SHOULD REMAND,

   (a) DIRECTING THE DISTRICT COURT TO ASSIGN ANOTHER JUDGE;
   (b) DIRECTING SUMMARY JUDGMENT BE ENTERED IN FAVOR OF PLAINTIFF, SUBJECT ONLY TO A TRIAL ON ISSUE OF DAMAGES SUSTAINED BY PLAINTIFF AT HANDS OF EACH DEFENDANT;
   (c) DIRECTING, IN THE ALTERNATIVE, THAT THE COURT DECIDE PLAINTIFF'S UNDECIDED MOTIONS FOR FURTHER DISCOVERY: AND THAT DEFENDANT NEWS INC. PRODUCE THE ORIGINAL CONTRACT OF OCTOBER 15, 1963, AND FOR DISQUALIFICATION OF THE ATTORNEY FOR 3 DEFENDANTS (ROY COHN ESQ.), AND THAT THE SAME

BE DECIDED AS PRIORITY MATTERS
BEFORE ANY TRIAL PROCEEDS.

THE CONCLUSION

THE JUDGMENT ENTERED BELOW SHOULD BE VACATED, PLAINTIFF'S DEFAULT OPENED, AND JUDGMENT FOR PLAINTIFF, AS AFORESAID, BE DIRECTED.

Respectfully submitted

Robert W. Farrell
Attorney for Plaintiff-Appallant
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Dated: November 3rd 1975

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OS APPEALS
FOR THE SECOND CIRCUIT

DILY MIRROR, INC.
Plaintiff- Appellant

- against -

NEW YORK NEWS, INC. ætal
Defendants- Appellees

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the 10th *day of* November *19*75 *at* see attached

deponent served the annexed Brief, see attached *upon*

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this 10th
day of November *19*75

Victor Ortega
VICTOR ORTEGA

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

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